Supreme Court, U.S.
FILED
JUN 1 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1755

In The

Supreme Court of the United States

October Term, 1988

DWIGHT'S DISCOUNT
VACUUM CLEANER CITY, INC.,

Petitioner,

v.

THE SCOTT FETZER COMPANY,
KIRBY COMPANY DIVISION,

Respondent.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CHARLES M. MCDONALD
MERRILEE L. HARMON

Please Serve:

CHARLES M. MCDONALD
MCDONALD, HARMON AND MALONE
P.O. Box 1672
Waco, Texas 76703-1672
(817) 754-7317

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

LIST OF PARTIES

Petitioner, Dwight's Discount Vacuum Cleaner City, Inc. is a close corporation wholly owned by its President, Dwight Krzywonski.

Respondent, the Scott Fetzer Company, Kirby Company Division, is a wholly owned subsidiary of BHSF, Inc. which is a wholly owned subsidiary of Berkshire Hathaway Corp.

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REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioner Dwight's Discount Vacuum Cleaner City, Inc., pursuant to Supreme Court Rule 22, respectfully submits this Reply to the Brief In Opposition to the Petition for Writ of Certiorari filed herein by Respondent Scott Fetzer Company, Kirby Company Division.

CORRECTION TO RESPONDENT'S STATEMENT OF THE CASE

Respondent has wholly misstated the vitally important procedural background of this case in its brief in opposition (pp. 2-3). These issues will be addressed first in this reply.

Respondent incorrectly states that it moved for a directed verdict on Petitioner's claims under the Deceptive Trade Practice Act as a whole at the close of the Petitioner's case (pp. 2,3). The record clearly shows Respondent confined its oral motion and argument thereon to Petitioner's status as a consumer under the Act (App. to Pet. pp. 43-45).

Furthermore, Respondent incorrectly states that it raised the issue of the insufficiency of the evidence of unconscionable conduct in its motion for judgment n.o.v. (p. 3).

Reduced to its simplest and clearest terms, Respondent's motion for judgment n.o.v. alleged one ground as follows, "Defendant would show that plaintiff is not entitled to recovery under said Act for the reason that Plaintiff did not plead, prove, or procure a finding or otherwise establish that it is a *consumer* under said Act." (App. to Pet. pp. 12-13).

The trial court properly denied the motion for judgment n.o.v., finding Respondent's argument that Petitioner was not a consumer under the Deceptive Trade Practice Act to be without merit (App. to Pet., p. 18).

Respondent also represents that it raised in the Court of Appeals as a point of error the trial court's failure to

grant a motion for judgment n.o.v. on the insufficiency of the evidence to support the jury's finding of unconscionable conduct (p. 4). This too is incorrect.

In its brief before the Court of Appeals, the only point of error raised by Respondent concerning motion for judgment n.o.v. was:

> In summary, *consumer status* is an essential element of Dwight's (Petitioner's) cause of action under the Act, and it was Dwight's burden to plead and prove that status . . . Dwight failed to carry that burden. That being the case, Kirby was entitled to judgment notwithstanding the verdict. (App. to Reply, p. 4).

Mistakenly, the Court of Appeals determined the key question to be "whether judgment n.o.v. should have been granted on the finding that Kirby acted unconscionably under the D.T.P.A." (App. to Pet., p. 26) although in fact this was never presented to the trial court or Court of Appeals (App. to Pet., pp. 12-13, App. to Reply, p. 2. The Court of Appeals then reviewed the evidence, disagreed with the jury's assessment thereof, and reversed and rendered judgment on this ground never urged by Respondent. (App. to Pet., pp. 24,31).

Therefore, the first time Respondent *ever* asserted that it was entitled to entry of judgment n.o.v. on the issue of insufficient evidence of unconscionable conduct was in May of 1989 in its Brief in Opposition to Petition for Writ of Certiorari which is the subject of this reply. Respondent's numerous assertions contrary to the record must be disregarded. *Hicks v. Mickelson*, 835 F.2d 721 (8th Cir. 1987); *Goldstein v. Kelleher*, 728 F.2d 32 (1st Cir. 1984); *Rosen v. Lawson-Hemphill, Inc.*, 549 F.2d 205 (1st Cir. 1976).

Respondent's statement that the appellate court characterized Petitioner's argument for affirmance as "an affront to the principles of fair dealing" is not true. (p. 10). In the context of the opinion, it is clear that the Court was referring to an argument supposedly advanced by Petitioner as to Respondent's lack of right to assert a counter-claim (App. to Pet., p. 30).

However, in its petition for rehearing Petitioner pointed out to the Court that the Court had misinterpreted Petitioner's argument in this regard (App. to Reply, p. 6).

While the substance of Respondent's personal attacks on counsel set forth in paragraph 5 on page 7 of its brief are inaccurate and inappropriate, Petitioner will refrain from replying thereto.

REPLY TO RESPONDENT'S REASONS FOR DENIAL OF THE WRIT

1. Abrogation of the Seventh Amendment Right To Trial By Jury Is Inherently A Matter Of Public Importance.

Respondent asserts that the appellate court's abridgement of the Seventh Amendment is not a matter of public importance (p. 9). This is contrary to the position taken by this Court since at least 1947 in *Cone v. West Virginia Pulp & Paper Company*, 330 U.S. 212, 67 S.Ct. 752, 91 L.Ed 849 (1947). See also *Commentary*, 83 S.Ct. 43 (1963). Petitioner thoroughly discussed this point in its petition though none of these cases have been addressed by Respondent (Pet. pp. 1-10).

Clearly, Respondent's disregard for the Seventh Amendment is without support in the law. *Byrd v. Blue Ridge Rural Electric Cooperative*, 356 U.S. 525, 78 S.Ct. 893, 2 L.Ed.2d 953 (1962); *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines*, 369 U.S. 355, 82 S.Ct. 780, 7 L.Ed.2d 798 (1962). The issues raised herein are a matter of importance not only to this Petitioner but to every citizen who shares in the protections of the Constitution.

2. Petitioner Did Not Waive Its Right To Complain About The Appellate Court's Sua Sponte Judgment Unsupported by the Record.

Respondent asserts that Petitioner "waived" the right to complain about the appellate court's power to render judgment on the issue of unconscionable conduct by not raising the issue until after the Court of Appeals rendered its decision (p. 7). For this argument to have merit, Petitioner would have had to anticipate that the Court of Appeals was going to exceed its power and authority and render judgment on an issue not before it.

It is Respondent's burden to bring before the appellate court a record sufficient to sustain its position. *Moran v. Raymond Corp.*, 484 F.2d 1008 (7th Cir. 1973). Having failed to do this, it is Respondent who waived its right to seek reversal and rendition of judgment on appeal on the unconscionable conduct issue. *Sector Refining, Inc. v. Enterprise Refining Co.*, 771 F.2d 496 (Temp.Emer.Ct.App. 1985); *Walters v. City of Atlanta*, 803 F.2d 1135 (11th Cir. 1986); *Kinzenbaw v. Deere and Co.*, 741 F.2d 383 (Fed.Cir. 1984); *Power Lift, Inc. v. Lang Tools, Inc.*, 774 F.2d 478 (Fed.Cir. 1985); *Lifshitz v. Walter Drake & Sons, Inc.*, 806

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Furthermore, Petitioner immediately objected to the appellate court's error in its petition for rehearing (App. to Pet., pp. 34-38). The Court of Appeals still had the power to correct its error though it failed or refused to do so (App. to Pet., p. 39). Compare *Braniff Airways, Inc. v. Curtiss-Wright Corp.*, 424 F.2d 427 (2nd Cir. 1970). There is therefore no merit to Respondent's waiver allegations.

3. Petitioner Is Entitled To Reinstatement Of The Trial Court Judgment By This Court.

Respondent asserts that Petitioner is entitled to no relief from this Court even assuming Respondent failed to comply with Rule 50. (pp. 8,9). The law is clearly to the contrary since failure to comply with Rule 50 precludes rendition of judgment on appeal even in the event that there is *no* evidence in the record to support the judgment. (Pet. pp. 7-20, App. to Pet. pp. 40,41).

However, contrary to Respondent's statements that in reality the appellate court found no evidence to support the verdict (pp. 8-9), the Court of Appeals actually held that there was *some* evidence to support the verdict though insufficient (App. to Pet., pp. 28,29,30,31). This characterization of the evidence by the Court was obviously intentional since the Court devoted portions of at least three pages of its opinion to a discussion of the sufficiency of the evidence and its standard of review

(App. to Pet., pp. 24-25, 28). Since the appellate court conceded the existence of evidence in the record to support the verdict, however insufficient, the trial court's judgment must be reinstated. *Bunch v. Walter*, 673 F.2d 127 (5th Cir. 1982); *Sheib v. Williams-McWilliams Company, Inc.*, 628 F.2d 509 (5th Cir. 1980); *In Re Owners of Harvey Oil Center v. Merchants Trust & Savings Bank*, 788 F. 2d 275 (5th Cir. 1986).

This Court has the power upon review to reverse the Court of Appeals' judgment and reinstate that of the trial court. Title 28 USCS Sec. 2106. (App. to Reply, p. 7). This is the relief respectfully requested by Petitioner and required under the law and the record before the Court.

CONCLUSION AND PRAYER

Petitioner respectfully prays that the Petition for Writ of Certiorari be granted; that the judgment of the Court of Appeals be reversed and that pursuant to Title 28 USCS Sec. 2106 the judgment of the trial court be reinstated.

Respectfully submitted,

McDonald, Harmon and Malone
Attorneys at Law
P. O. Box 1672
Waco, Texas 76703
817/754-7317

By Charles M. McDonald
Texas Bar No. 13537000

Merrilee L. Harmon
Texas Bar. No. 09020900

Please serve:

Charles M. McDonald
P. O. Box 1672
Waco, Texas 76703-1672
(817) 754-7317

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-1939

DWIGHT'S DISCOUNT VACUUM CLEANER CITY,

PLAINTIFF-APPELLEE

v.

THE SCOTT FETZER COMPANY, KIRBY COMPANY DIVISION,

DEFENDANT-APPELLANT

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO, TEXAS

BRIEF FOR APPELLANT

Beverly Willis Bracken
Steve L. Moody
of
NAMAN, HOWELL,
SMITH & LEE, P. C.
Texas Center
P. O. Box 1470
Waco, Texas 76703-1470
(817) 754-1421

ATTORNEYS FOR
APPELLANT

* * *

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ISSUE NO. II 2

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* * *

FACTS, ARGUMENT AND AUTHORITIES

I. *Whether plaintiff Dwight's Discount Vacuum Cleaner City was a consumer so as to make the remedies provided by the Texas Deceptive Trade Practices-Consumer Protection Act available against defendant Kirby.*

Section 17.50 of the Act provides:

> (a) A *consumer* may maintain an action where any of the following constitute a producing cause of actual damages:
>
> (3) any unconscionable action or course of action by any person; (Emphasis added.)

It has been held repeatedly that one must be a consumer to maintain an action and recover damages under the Act. *Riverside National Bank v. Lewis*, 603 S.W.2d 169, 173 (Tex. 1980); *Bancroft v. Southwestern Bell Telephone Company*, 616 S.W.2d 335, 337 (Tex. Civ. App. – Houston [14th Dist.] 1981 n.w.h.). A party seeking recovery under the Act has the affirmative obligation to plead his consumer status and prove it. *Farmers & Merchants State Bank v. Ferguson*, 617 S.W.2d 918, 920 (Tex. 1981); *Delaney Realty, Inc. v. Ozuna*, 593 S.W.2d 797, 800 (Tex. Civ. App. – El Paso, writ ref'd n.r.e., 600

* * *

acquire a shipment of vacuum cleaners and accessories from Carol J. Weeks, it did not plead facts that would tend to make Kirby a participant in that transaction in any way. Furthermore, it was not Kirby's burden to seek a jury finding on the consumer issue; it was Dwight's and Dwight failed to carry that burden. That being the case, Kirby was entitled to judgment notwithstanding the verdict.

* * *

IN THE
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V.

THE SCOTT FETZER COMPANY, KIRBY COMPANY DIVISION,
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APPEAL FROM
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PETITION FOR PANEL REHEARING

McDONALD, HARMON AND MALONE
P.O. Box 1672
Waco, Texas 76703-1672
(817) 754-7317

BY: Charles M. McDonald and Merrilee L. Harmon

ATTORNEYS FOR APPELLEE

* * *

The Court's statement on page 680 that Kirby believed it was entitled to reclaim the goods was one of the most contested issues. The evidence shows that Kirby's only remedy was to *repurchase* unsold goods that

Weeks had on hand as of the date of termination (July 3, 1986) of the distributorship agreement, *which did not include the goods already sold to Dwight on June 26, 1986.* (p. 42, 104, 178, 262, 301-303, 355-360, 362, 363, 364, 365, 557, 558, 561, 570, 578, 591, 593, 780, 781, 782, 395, 396, 400, 555, 557, 558, 561, 578, 590, 747, 780-783).

The statement on page 681 that Weeks returned $9,000.00 to Dwight before trial is incorrect to the extent that Dwight repaid $4,500.00 to Week's estate through the Bankruptcy Court prior to trial. (p.200).

The Court's statement at page 680 that Kirby's marketing system is organized exclusively on direct in-home sales is disputed in the evidence. (p. 290, 293, 366, 367, 552, 620-627, 809-810).

On page 684 of the opinion, the Court stated that one of Dwight's arguments was that Kirby had no right to file a counterclaim against Dwight's. This is incorrect for Dwight's brief refers specifically to Kirby's counterclaim against Dwight (p. 16-17). Furthermore, in oral argument, counsel for Dwight argued that Kirby's remedy was a counterclaim against Dwight for any alleged damages rather than exclusion of coverage to Dwight under the DTPA.

* * *

28 U.S.C.S., Sec. 2106

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings, to be had as may be just under the circumstances.